U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL FIERSTEIN and DEPARTMENT OF THE NAVY, LONG BEACH NAVAL SHIPYARD, Long Beach, CA

Docket No. 98-2533; Submitted on the Record;
Issued March 24, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's July 30, 1996 request for an increased schedule award is barred by the time limitation provisions of the Federal Employees' Compensation Act.

The Board finds that the Office improperly determined that appellant's request is barred by the time limitation provisions of the Act.

Section 8122(a) of the Act states: "An original claim for compensation for disability or death must be filed within three years after the injury or death."[1] Section 8122(b) provides that in latent disability cases, the time limitation does not begin to run until the claimant is aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between his employment and the compensable disability.[2] The Board has held that if an employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of this exposure.[3]

On May 20, 1975 appellant filed an occupational disease claim and a request for a schedule award (A13-511361) alleging that he sustained a hearing loss due to exposure to hazardous noise at work. He was a 41-year-old electrician at the time he filed his claim. Appellant subsequently retired on June 17, 1976.[4] By form letter (CA-1043) dated January 6,

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[1] 5 U.S.C. § 8122(a).

[2] 5 U.S.C. § 8122(b).

[3] *Charlene B. Fenton*, 36 ECAB 151, 157 (1984); *Gladys E. Olney*, 32 ECAB 1643, 1645 (1982).

[4] The record indicates that appellant retired on disability due to an unrelated employment injury that occurred on November 10, 1975. The record further indicates that appellant was on leave without pay from December 26, 1975 until his retirement on June 17, 1976.

1978, the Office advised appellant that he was not entitled to compensation because the medical evidence of record indicated that he did not have a compensable hearing loss at that time.[5] The Office based its determination that appellant did not have a ratable hearing loss on the December 30, 1977 calculation of the Office medical adviser, who reviewed a December 10, 1976 audiogram and a January 6, 1977 report from Dr. Murray Grossan, a Board-certified otolaryngologist and appellant's treating physician.[6] The Office medical adviser noted a diagnosis of employment-related binaural sensorineural hearing loss, however, he reported a 0 percent impairment for schedule award purposes.

There is no dispute that appellant's May 20, 1975 claim was timely filed in accordance with 5 U.S.C. § 8122.

On October 9, 1981 appellant again requested a schedule award for "additional hearing loss," noting he originally filed his claim in 1975 and that as the years progressed, his hearing had gotten worse. It does not appear from the record that appellant submitted any additional medical evidence nor does it appear that the Office attempted to further develop the record. By decision dated January 29, 1982, the Office advised appellant that while it had been determined that he sustained a permanent partial hearing loss bilaterally as a result of exposure to hazardous noise in the performance of duty, the extent of his hearing loss was not sufficient to warrant compensation. As was the case with the Office's prior determination, the January 29, 1982 finding was similarly based upon a review of the report and audiogram submitted by Dr. Grossan on January 6, 1977.

Appellant again wrote to the Office on February 7, 1989, requesting that he be provided with a hearing aid as recommended by his physician. Additionally, he submitted a report of a recent audiogram administered on February 1, 1989. Appellant also inquired as to whether he was entitled to a monetary award for his hearing loss. On March 23, 1989 the Office acknowledged receipt of appellant's letter and advised him that while his claim had been accepted for bilateral hearing loss, a formal decision rendered in 1982 found that he was not entitled to compensation for his injury. The letter concluded with the statement "No hearing aid is authorized."

Appellant filed another request for an increased schedule award (Form CA-7) on July 12, 1991. The Office also received treatment records and audiograms from Dr. Leon Goldman, who first saw appellant on January 27, 1989. By letter dated January 10, 1992, the Office acknowledged receipt of appellant's claim (A13-0966744) and indicated that it appeared to be a duplicate of his previously filed claim (A133-511361). The letter further indicated: Noise[-] related hearing loss conditions usually do not worsen without additional noise exposure. If you retired in 1976, then you would not have a history of continued [f]ederal employment

[5] The letter further indicated: "We will keep your claim for future consideration in the event you have any further difficulty which may be the basis for compensation payments or medical treatment."

[6] Dr. Grossan diagnosed tinnitus and reduced hearing and explained that appellant's hearing loss was greater than one would expect to find in an individual of his age. He further indicated that persons exposed to loud noise-acoustic trauma, do show the type of hearing loss demonstrated by appellant.

noise exposure." Appellant was advised that his file would be left open 14 days in order for him to provide a basis for this second claim."

By decision dated March 12, 1992, the Office denied appellant's claim for failure to establish fact of injury. The Office explained that appellant failed to demonstrate any additional noise exposure in his federal employment after the period of employment covered in his initial claim (A13-511361).

In a letter to the Office dated May 3, 1994, appellant advised, once again, that he needed a hearing aid and asked whether he should buy the device and submit the bill to workers' compensation. Along with his letter, he submitted a January 12, 1994 report from Dr. Goldman and a December 7, 1993 audiogram. His report noted that appellant had a severe bilateral sensorineural hearing loss. Dr. Goldman also stated that the source of the hearing loss "could be prior noise exposure plus presbycusis."

In response to appellant's inquiry, the Office, by letter dated June 8, 1994, explained that his claim had previously been accepted for bilateral hearing loss, but that in 1982 the Office had determined that he was not entitled to compensation for his injury. Additionally, the Office noted that authorization for a hearing aid had also been previously denied. Appellant was advised that if he felt he sustained additional hearing loss as a result of employment-related exposure to hazardous noise, he must file a new claim on Form CA-2.

On July 30, 1996 appellant filed another claim for additional hearing loss. He identified July 12, 1991 as the date he first became aware of his employment-related disease or illness.[7] Appellant also submitted an audiogram dated January 16, 1996 and resubmitted Dr. Goldman's January 12, 1994 report.

The Office wrote to appellant on September 26, 1996 advising of its receipt of his July 30, 1996 Form CA-2 (A13-1109318) and the accompanying evidence from Dr. Goldman. The Office further acknowledged that it had previously accepted under claim number A13-511361 that appellant had a bilateral hearing loss. Additionally, the Office explained the time limitations imposed under 5 U.S.C. § 8122 for filing a claim. After noting that appellant had identified July 12, 1991 as the date he first realized his claimed additional hearing loss was employment related, the Office asked appellant to explain why he did not file a claim until July 30, 1996. In closing, the Office cautioned that "It would seem unlikely any additional loss could be attributed to employment because … your last exposure was 1975, when you retired."

Appellant responded by letter dated October 7, 1996, explaining that he realized his hearing loss was employment related prior to 1975 and that perhaps he misunderstood the question on the Form CA-2. In an effort to explain his apparent delay in pursuing his hearing

[7] On the Form CA-2 filed by appellant, he initially identified 1975 as the date he first became aware of his disease as well as the date he first realized the disease was caused or aggravated by his employment. However, the 1975 date was stricken and replaced with July 12, 1991. He initialed the changes. It is unclear from the record what prompted this change, and the only apparent significance of the July 12, 1991 date is that it coincided with the date appellant previously filed a Form CA-7 requesting an increased schedule award.

loss claim, appellant indicated that he had a number of other medical conditions that warranted his attention more so than his progressive hearing loss.

By decision dated December 18, 1996, the Office denied appellant's claim for an increased schedule award on the basis that the claim was not timely filed.

Appellant subsequently requested an oral hearing, which was conducted on March 18, 1998. He also submitted a March 4, 1998 audiogram.

The Office's hearing representative denied appellant's July 30, 1996 claim for an increased schedule award by decision dated May 21, 1998. She found that appellant failed to file a timely notice of injury for the additional hearing loss claimed. The Office hearing representative explained that because appellant was aware that he had an employment-related hearing condition prior to his retirement in 1976, the three-year time limitation for filing a claim under 5 U.S.C. § 8122 began to toll on the date of his last exposure, June 17, 1976. Consequently, the hearing representative concluded that with the exception of his initial May 20, 1975 claim, all of appellant's subsequent filings, beginning in 1981, were untimely. The hearing representative, therefore, affirmed the Office's prior decision dated December 18, 1996.

On July 10, 1998 appellant filed a request for reconsideration accompanied by a June 17, 1998 audiogram and a June 24, 1998 report from Kenneth G. Smith, an audiologist. The Office denied appellant's request for reconsideration on August 5, 1998 without reaching the merits of his claim.

The Board has long recognized that if a claimant's employment-related hearing loss worsens in the future, he may apply for an additional schedule award for any increased permanent impairment.[8] Furthermore, in hearing loss claims, a claim for an additional schedule award based on an additional period of exposure constitutes a new claim.[9] The Board has also recognized that a claimant may be entitled to an award for an increased hearing loss, even after exposure to hazardous noise has ceased, if causal relationship is supported by the medical evidence of record.[10] In this latter instance, the request for an increased schedule award is not deemed a new claim.

Although the record indicates that appellant had additional noise exposure subsequent to the date he filed his initial claim on May 20, 1975, one cannot logically conclude that appellant's later requests for an increased schedule award were filed based on the premise that his post-May 1975 employment exposure caused his claimed increased hearing loss. The medical evidence that formed the basis of the Office's initial January 6, 1978 determination that appellant did not have a ratable hearing loss was compiled approximately six months after appellant's June 1976 retirement and more than a year after what appears to be appellant's last date of exposure to

[8] *Paul R. Reedy*, 45 ECAB 488, 490 (1994).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(b)(3) (March 1995).

[10] *Paul R. Reedy, supra* note 8.

noise.[11] Thus, it is reasonable to assume that the Office, in relying upon Dr. Grossan's January 6, 1977 report and appellant's December 10, 1976 audiogram, took into account appellant's entire history of occupational noise exposure when it rendered its initial determination on January 6, 1978. As such, appellant's July 30, 1996 request for an increased schedule award cannot reasonably be construed as a new claim based on additional occupational exposure.

During the more than 20-year period since the Office initially determined that appellant's employment-related bilateral hearing loss was not severe enough to warrant compensation, appellant has attempted to obtain an increased schedule award. The Office, for one reason or another, has consistently denied appellant's repeated requests; apparently without ever developing the record further or even addressing the medical evidence submitted by appellant. In at least one prior decision, the Office improperly required appellant to demonstrate additional employment exposure as a prerequisite to entitlement. And in its most recent merit decision, the Office erred by invoking 5 U.S.C. § 8122 as a bar to appellant's seeking an increased schedule award. Inasmuch as appellant is pursuing his original claim, which was timely filed on May 20, 1975, his subsequent filings are not subject to the limitations imposed under 5 U.S.C. § 8122. As noted, appellant may be entitled to an award for an increased hearing loss, even after exposure to hazardous noise has ceased, if the probative medical evidence of record demonstrates a causal relationship between his hearing loss and his accepted employment exposure.[12]

The Board, will therefore, remand the case to the Office for further development of the medical record to ascertain the extent of appellant's claimed increased hearing loss and if his loss is causally related to his previously accepted employment exposure. After such development of the case record as the Office deems necessary, a *de novo* decision shall by issued.

[11] As previously noted, appellant sustained an employment-related back injury on November 10, 1975. It is not entirely clear from the record whether appellant returned to work following the November 10, 1975 incident. However, the record clearly indicates that appellant was on leave without pay from December 26, 1975 until his retirement on June 17, 1976.

[12] *Paul R. Reedy, supra* note 8.

The decisions of the Office of Workers' Compensation Programs dated August 5 and May 21, 1998 are hereby, set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
March 24, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member